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Case No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

JAMES SAFFLE, WARDEN, and
GARY MAYNARD, DIRECTOR, OKLAHOMA
DEPARTMENT OF CORRECTIONS
Petitioners,

v.

MARK ROY LILES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1991

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QUESTION PRESENTED

Whether the Tenth Circuit was correct in expanding the holding of Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) to compel the State to furnish a mental health expert where the defendant did not raise or plead insanity as a defense, was found competent to stand trial, and psychiatric evidence was not used against him in the sentencing stage of a trial which occurred before the decision in Ake was handed down.

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PETITION FOR A WRIT OF CERTIORARI
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OPINIONS BELOW

In a federal habeas corpus action, the defendant was granted summary judgment on his claim that Oklahoma violated his rights by not granting his motion for a mental health expert at state expense. The State appealed to the Tenth Circuit, which affirmed the action of the federal district court in

Liles v. Saffle, ____ F.2d ____, 1991 WL 180096 (10th Cir. Sept. 16, 1991). It is from that decision that the State of Oklahoma now seeks certiorari from this Court.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). Jurisdiction in the district court was conferred by 28 U.S.C. § 2254. Jurisdiction in the Tenth Circuit Court of Appeals was conferred by 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Defendant Liles is incarcerated pursuant to a Judgment and Sentence rendered on July 11, 1983, in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-82-4268.

Defendant was convicted by a jury of his peers of the crime of Murder in the First Degree. During the sentencing phase of defendant's trial the jury found that the murder was especially heinous, atrocious, or cruel and the existence of a probability that the defendant would commit criminal acts of violence that could constitute a continuing threat to society. Having found the existence of two of the aggravating circumstances necessary under Okla. Stat. Ann. tit. 21, § 701.12 before a penalty of death can be imposed, the jury then assessed the death penalty. The trial court followed the recommendation of the jury. Defendant filed a direct appeal from his conviction, which was affirmed by the Oklahoma Court of Criminal Appeals in

Case No. F-83-427, recorded at Liles v. State, 702 P.2d 1025 (Okla. Crim. App. 1985).

Following the affirmance of his conviction, the defendant filed for a writ of certiorari from the United States Supreme Court which was denied in Liles v. Oklahoma, 476 U.S. 1164, 106 S.Ct. 3341, 92 L.Ed.2d 749 (1986). The defendant then filed his first application for post-conviction relief in the District Court of Oklahoma County on October 24, 1986. After the original application was amended, the trial court denied the application on April 28, 1987. Defendant appealed that denial to the Oklahoma Court of Criminal Appeals, which affirmed the denial in an unpublished order dated July 9, 1987. On September 8, 1987, the defendant

filed a second petition for writ of certiorari with the United States Supreme Court, which was also denied. Liles v. Oklahoma, 484 U.S. 933, 108 S.Ct. 308, 98 L.Ed.2d 266 (1987), rehearing denied 484 U.S. 1021, 108 S.Ct. 738, 98 L.Ed.2d 685 (1988). On May 23, 1988, the defendant filed a second post-conviction application in the District Court of Oklahoma County. That application was denied on June 27, 1988. The Court of Criminal Appeals affirmed the denial of that application on April 25, 1989. In the latest petition for writ of certiorari to the United States Supreme Court, the defendant was denied relief on October 30, 1989. Liles v. Oklahoma, 110 S.Ct. 353, 107 L.Ed.2d 341 (1989).

The defendant then filed his Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Oklahoma, where he was granted summary judgment on his claim that he was unconstitutionally denied his right to a fair trial by the denial of a state provided mental health expert. The Tenth Circuit Court of Appeals affirmed the holding of the district court, and it is from that order that the State now seeks certiorari relief.

REASONS FOR GRANTING THE WRIT

In Ake, this Honorable Court found five factors which it felt mandated the appointment of a State provided-for psychiatrist for a criminal defendant. Those relevant factors in the Ake case were:

> 1) Ake's sole defense was that of insanity.
>
> 2) Ake's bizarre behavior at arraignment caused the trial court, sua sponte, to have Ake examined for competency.
>
> 3) A state psychiatrist found Ake to be incompetent to stand trial, and suggested that he be committed.
>
> 4) When Ake was later found to be competent, it was only on the provision that he be sedated with Thorazine three times a day, during trial.
>
> 5) The psychiatrist who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense, and suggested that the mental illness might have begun many years earlier.

Recognizing that insanity is a recognized defense in Oklahoma under which the defendant has the initial burden of producing evidence, this Court then found that "[t]aken together, these factors make clear that the question of

Ake's sanity was likely to be a significant factor in his defense." Ake, 470 U.S. at 86. In an accompanying footnote, the Court said "[w]e express no opinion as to whether any of these factors, alone or in combination, is necessary to make this finding." Ibid, footnote 12. It is the legal question reserved in that footnote which must now be resolved.

Only one of the factors found in Ake is present in this case. Applying those factors to defendant Liles' case, it is apparent that the defendant:

> 1) Never raised, or attempted to raise, the defense of insanity.
>
> 2) Never displayed any signs of bizarre behavior before the trial court, and was examined for competency at the request of his trial counsel. (Doc. 28, State court O.R.[1], pp. 36 - 37).

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[1] Original Record

> 3) Was found competent to stand trial by the state psychiatrist. (Doc. 28, State court O.R., pp. 47 - 48).
>
> 4) Was to remain on Thorazine "to retain his present degree of stability" and was further advised that possible follow-up care at an out patient mental health clinic might be needed. (Doc. 28, State court O.R., p. 48).
>
> 5) Although diagnosed as being aggressive, and having an "intermittent explosive disorder," as well as suffering from alcohol abuse, he was ruled to be competent and "not psychotic." (Doc. 17, Discharge Summary from Eastern State Hospital, Defendant's Documentation of Ake Claim).

The only common factor between defendant Liles' case and the Ake case is that both men were prescribed Thorazine after their release from the state mental health hospital.

The question presented for certiorari review revolves around a

critical issue which has not yet been decided by this Court: "To what extent does the Ake case apply in a pre-Ake criminal trial which did not involve an insanity defense or mental health evidence in aggravation?" Under the Tenth Circuit's holding, Ake has been extended to require that a mental health expert be provided in any criminal case in which an expert could possibly be beneficial to the defense.

The federal district court's opinion held that the Ake doctrine requires that "a state provide access to the psychiatric assistance necessary to prepare an effective defense based on mental condition if a criminal defendant cannot otherwise afford such assistance." (Liles v. Saffle, Western District Case No. CIV-89-2271-W,

Judgment dated November 7, 1990, pp. 4 - 5). The decision below would not require a defendant to plead insanity as a defense, but would rather allow a court appointed psychiatrist in the first instance, before insanity was plead or raised, to determine whether or not sanity should or could be utilized as a defense. Such a holding, the State submits, makes a mental health expert an integral part of every criminal trial which involves a crime requiring specific intent.

Neither did the lower courts accept the narrow dictates of Ake which hold that a State appointed psychiatrist must only be provided for second stage assistance where the State first uses psychiatric evidence in aggravation. In Ake, this Court found that where the

State presents psychiatric evidence of the defendant's future dangerousness, the defendant is entitled to psychiatric assistance to attempt to rebut that evidence. Ake, 470 U.S. at 83 - 86; Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990). Recognizing that the Liles decision is an expansion of this Court's holding in Ake, the Tenth Circuit held:

> Although the Court discussed the necessity of psychiatric assistance to enable a defendant to respond to and challenge the state's psychiatric assistance to enable a defendant to respond to and challenge the state's psychiatric evidence concerning future dangerousness, the Court did not expressly limit a defendant's right of psychiatric assistance to situations where the state first presents psychiatric evidence. . . In this case, because the state presented evidence concerning petitioner's future dangerousness, albeit not psychiatric evidence, and because petitioner established the likelihood that his mental condition could have been a

> significant mitigating factor, the district court correctly determined that the state trial court deprived petition of due process by denying him court-appointed psychiatric assistance at the sentencing phase of his trial.

Liles v. Saffle, ____ F.2d ____, 1991 WL 180096, pp. 7 - 8 (10th Cir. Sept. 16, 1991). The Tenth Circuit has held that psychiatric assistance in second stage is not limited to those instances where the State uses psychiatric evidence in aggravation, but in all cases where future dangerousness is an issue. Thus, any time the aggravating circumstance of continuing threat to society is alleged, a mental health expert must be appointed for the defendant.

The holding of Ake is narrow. A defendant is entitled to state provided mental health assistance only if he makes a threshold showing that his

mental condition is to be a significant factor at trial. Clisby v. Jones, 907 F.2d 1047 (11th Cir. 1990); Jackson v. Ylst, 921 F.2d 882 (9th Cir. 1990); Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990); Harris v. Vasquez, supra.

For a thorough discussion on the breadth of the Ake holding, see Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990). As Judge Kennedy wrote in his separate opinion in that case:

> Appellant's constitutional rights under Ake were not violated. Ake's guarantee of a state-funded psychiatrist arises only after defendant shows that his sanity will be "a significant factor at trial." (Citations omitted). Appellant never attempted to raise insanity as a defense. At most he sought to show that his capacity was diminished through drug and alcohol use, thus depriving him of the specific intent necessary to convict him of intentional murder. Although Ake does not establish a bright line test for determining when

> a defendant has demonstrated that "sanity at the time of the offense will always be a significant factor," it is clear that "Ake requires that the defendant, at a minimum, make allegations supported by a factual showing that the defendant's sanity is in fact at issue in the case." (Citations omitted). Such a showing is not made by merely positing that appellant was a habitual drug and alcohol abuser.

Kordenbrock, 919 F.2d at 1119. Defendant Liles never made a factual showing that his sanity was to be an issue in his case. In the underlying federal habeas action, the defendant attempted to show that he could have made such a showing, utilizing in part new psychiatric evidence to attempt to prove that his sanity was a real issue at the time of the crime, and at trial. In the most recent denial of federal

habeas relief[2] in the Harris case, the Ninth Circuit refused to consider the testimony of new psychiatric experts who attempted to rebut the psychiatric evidence presented at trial. The Ninth Circuit stated:

> The availability of such a judicial evaluation in a federal habeas proceeding would allow a defendant who has been given access to competent psychiatric assistance under Ake to establish a constitutional infirmity to his death penalty through the opinions of new psychiatrists who, eleven years later, offer different opinions.

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[2]The latest Harris decision is to be reported at Harris v. Vasquez, 943 F.2d 930 (9th Cir. 1991), but has not yet been reported. It was accessed on WestLaw. An earlier case, Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990) has been cited above.

Harris v. Vasquez[3]. The Ninth Circuit went on to hold that to allow an evidentiary hearing utilizing the "new" psychiatric evidence in an attempt to rebut the evidence at trial would be to establish a new rule under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and was impermissible.

In a case such as this, which was tried before Ake, the Tenth Circuit has held that the defendant must show that he could have made a threshold showing under Ake that his sanity at the time of the offense was to be a significant issue at trial. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986). Here,

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[3]Publication page references for the federal reporter are not yet available. This citation occurs at page 87 in the WestLaw edition of this opinion.

the Tenth Circuit allowed the defendant to use new evidence to attempt to meet this standard. The Tenth Circuit considered defendant Liles' "new" psychiatric evidence presented by Dr. Russell Monroe, who examined only the defendant's hospital records some eight (8) years after the fact, and by self-serving affidavits from the defendant's family made some seven (7) to eight (8) years after trial. The Tenth Circuit wrongly considered this evidence in deciding whether or not the defendant could have made a showing that his sanity was to be a significant issue at trial. What should have been used to decide the issue was the existing medical records at the time, which clearly indicated that the defendant, though perhaps mentally disturbed, was

competent to stand trial, and was legally sane.

In originally deciding this case, the Court of Criminal Appeals considered the holding of Ake and found that the defendant had failed to demonstrate to the trial court his sanity was to be a significant factor at trial. Liles, 702 P.2d at 1033. As the Court explained:

> Appellant never plead or attempted to prove an insanity defense. In applying for the funds, appellant failed to show cause for doubting his sanity. Counsel on appeal suggests that the fact appellant was placed on psychotropic drugs at the State mental hospital is sufficient to raise doubts as to his mental state. But we consider this circumstance inadequate to demonstrate that insanity would be a key factor to appellant's defense at trial, or that his mental condition was seriously in question.

Liles, 702 P.2d at 1034. The Court of Criminal Appeals distinguished the facts of Mr. Liles' case to Ake.

> This case is much different than that of Ake, supra, which involved a defendant diagnosed as psychotic and who advised the court that he would raise a defense of insanity at trial. In that case, the State presented psychiatric evidence against the defendant. We find that the trial court in the instance case did not err in denying appellant's motion for the requested funds.

Liles, 702 P.2d at 1034. The holding of Ake is that:

> [W]hen a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one.

Ake, 84 L.Ed.2d at 60. The Oklahoma Court, in interpreting Ake, has held that mere undeveloped assertions that

the requested psychiatric or psychological assistance would be beneficial is insufficient to establish a due process violation. See, Castro v. State, 745 P.2d 394, 399 (Okla. Crim. App. 1987); Liles, 702 P.2d at 1033.

Other states have also applied a narrow interpretation to the Ake decision. In the very recent case of North Carolina v. Roper, _402 S.E.2d 600 (N.C. 1991), the North Carolina Supreme Court held:

> [T]his Court, consistent with post-Ake decisions, has held that in addition to a threshold showing of a "significant factor," which has been interpreted to mean a "specific necessity," the defendant "must demonstrate either that without expert assistance he will be deprived of a fair trial, or that there is a reasonable likelihood that it will materially assist him in the preparation of his case." (Citations omitted).

North Carolina v. Roper, 042 S.E.2d at 609. And, in the case of Christenson v. Georgia, 402 S.E.2d 41 (Ga. 1991), the Georgia court held that Christenson had presented no evidence by which the trial could reasonably have inferred that the question of sanity would be a significant factor at trial. As the court in that case stated:

> The evidence in this case shows that the defendant is selfish and manipulative, lacks regard for the rights of others, has abused drugs and alcohol, and has committed numerous crimes. But it does not show that the defendant suffers from any serious mental disorder. It was not abuse of discretion to deny the defendant's request for court-funded psychiatric assistance.

Christenson v. Georgia, 402 S.E.2d at 46. See also Kansas v. Owens, 807 P.2d 101 (Kan. 1991).

The Tenth Circuit's holding has expanded Ake beyond its original intent, contrary to this Court's holding, the decisions in other circuits, and the highest state courts. Under the Tenth Circuit's holding, a criminal defendant is entitled to a state appointed mental health expert merely on an assertion that such an expert would be beneficial and could possibly provide assistance to the defense at trial or during second stage. The Tenth Circuit's very specific holding also requires that state provided psychiatric assistance is mandated where the defendant's future dangerousness is an issue, regardless of the lack of psychiatric evidence presented by the State. Thus, in all cases in which Oklahoma's aggravating circumstance of "continuing threat to

society" is alleged, the defendant must be furnished with a court appointed expert to assist him.

CONCLUSION

The Tenth Circuit has impermissibly expanded the holding of Ake v. Oklahoma beyond the dictates of this Court, and the clear weight of authority from the other circuits, and the highest state courts. Thus, this Honorable Court should grant certiorari in order to clarify the reserved issue of law in the Ake decision and to provide uniform guidance to the circuits regarding the breadth of that holding.

Respectfully submitted,

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